wife to obtain a separate domicile, though for purposes of divorce only.[8] Either domicile on the part of the husband,[9] or on the part of the wife,[8] confers jurisdiction on the court. And prior to Haddock *v.* Haddock,[10] a divorce obtained at either domicile was entitled to full faith and credit throughout the Union,[9] without reference either to matrimonial domicile or to personal jurisdiction of the libellee. Before that decision, therefore, matrimonial domicile, as distinguished from the individual domicile of either husband or wife, was without jurisdictional significance, precisely as it is without such significance in England today.

It is true, as a recent article points out, that certain Scotch cases had suggested that matrimonial domicile, as distinguished from the individual domiciles of the spouses at the time of proceedings, might be a basis of jurisdiction, but Le Mesurier *v.* Le Mesurier [1] swept this doctrine away. *Matrimonial Domicil*, Anon., 11 Bench and Bar 37 (November, 1907). It remained for Haddock *v.* Haddock [10] to revive this discarded view in America. That case apparently holds that, unless the divorce proceedings be brought at the matrimonial domicile, personal jurisdiction of the libellee must be superadded to individual domicile on the part of the libellant to entitle the decree to full faith and credit throughout the Union. Thus, matrimonial domicile may, in certain cases, replace individual domicile as the jurisdictional fact.

But matrimonial domicile is a most unsatisfactory basis for divorce jurisdiction. It is of necessity a domicile of choice. To create it there must be conjugal residence within the state, *animo manendi*. It may therefore never exist at all. If, then, matrimonial domicile is made the sole jurisdictional fact, there can be no divorce at all in such a case, since cohabitation after the offense, with knowledge of it, works condonation. This is a hardship on the parties, and also denies to the states in which they may have individual domiciles proper control over the marriage status. And this remains true, though the spouses have separate domiciles in the same state, since two individual domiciles added together do not make a matrimonial domicile. Nor is the situation greatly improved if the spouses obtain a matrimonial domicile, but separate prior to the offense and acquire individual domiciles elsewhere. Here a divorce may be possible if we allow matrimonial domicile, like individual domicile, to persist after abandonment until a new matrimonial domicile is established, but the injured party, *ex hypothesi*, must resort to the matrimonial domicile, to the exclusion of the state of individual domicile. In other words, neither of the states really interested by reason of domicile may grant the divorce, while the state which has ceased to be interested may do so. Such a divorce proceeding is little better than an *ex parte* action *in personam*. Yet it has been held again and again that personal jurisdiction of both parties is insufficient to sustain a divorce.[1] Under one set of circumstances, it is true, the matrimonial requirement has no ill effects. If either spouse happens to have an individual domicile in the state of matrimonial domicile, almost all American courts agree that divorce is proper, but there it is the individual domicile which saves the situation. If both kinds of domicile coincide, it is immaterial, in that particular case, which one is chosen as the jurisdictional fact. The total result is, therefore, that unless the matrimonial requirement is without effect, it prevents divorce in those states where divorce should be granted, while perhaps making it possible in that state where divorce should be denied. And surely, from a practical point of view, there is a fine Rabelaisian irony in requiring the spouses to cohabit in some state, *animo manendi*, as a condition precedent to dissolving the marital relation.

E. H. A., JR.

COMMISSION ON A SALE SUBSEQUENT TO A LETTING PROCURED BY AN AGENT. — A recent decision of the English Court of Appeal that an estate agent with whom a landowner had placed property and who had procured a

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[8] Ditson *v.* Ditson, 4 R. I. 87; Cheever *v.* Wilson, 9 Wall. (U. S.) 108.
[9] Atherton *v.* Atherton, 181 U. S. 155.
[10] 201 U. S. 562.

tenant and received his commission for the letting, should, on a subsequent sale of the property directly between the landowner and the tenant, be entitled to a commission,[1] is discussed by Mr. J. K. F. Cleave in a recent article. *Letting and Subsequent Sale: Estate Agents' Commissions*, 33 L. Mag. and Rev. 48 (November, 1907). After an examination of the authorities the author concludes that this decision has thrown the law on an apparently simple branch of agency into an unsettled state.

In such cases the result is to be reached through the answers to two questions: (1) Was the plaintiff employed by the defendant to bring about the transaction with respect to which he claims a commission or does a former agency still exist and cover that transaction? (2) Did the plaintiff bring about that transaction, or, as it is frequently put in the books, was he the "procuring" or "efficient" cause? On the agent's ability to establish the affirmative of both these questions depends his right to a commission.[2] The discussion, then, must be solely as to an issue of fact, and when it is said that there is a confusion in the cases it is well to bear in mind a point which the author apparently overlooks, that these findings of fact cannot, in the nature of things, be absolutely binding and conclusive on subsequent issues. However, the criticism of the case in question is not without foundation, since certain questions of fact recur again and again, and it is desirable that some uniformity in the findings should be preserved. Indeed, to render the dealings of landowners and estate agents more certain, it might be well that certain findings should become crystallized into rules of law.

The answer to the first question, whether the employment still exists, should depend on certain principles and, to some extent, it does. Thus, where the agent has effected a sale, the landowner cannot defeat his right to commission by a fraudulent discharge,[3] or by refusing to comply with the sale procured.[4] But where no time limit is fixed the employment ceases if after a reasonable time the agent has failed to find a customer.[5] And if, as in the present case, an agent has been employed to let or sell and procures a tenant, the better view, in absence of anything to the contrary in the agreement, seems to be that he has exhausted his power and that he is not entitled to commission on a subsequent sale by the landowner to the tenant.[6] Any other rule would unreasonably deprive the owner of a free right to the world as a market. The recent decision which Mr. Cleave criticizes seems to have resulted from a disregard of this principle. In answer to the second question, it is impossible to determine or formulate anything definite as to what constitutes "efficient" cause. At least, something more than a mere introduction to the landowner of the person who ultimately becomes the purchaser is required.[7]

Mr. Cleave also discusses another point: whether the question is to be left to the jury or reserved for the court. Former English rulings are to the latter effect.[8] In this country the question does not appear to have come up in connection with a letting and subsequent sale, but in similar cases where the agent has introduced a person who subsequently purchases directly from the owner, it has universally been left to the jury whether or not the agent is entitled to a commission, as the efficient cause of the sale.[9] Mr. Cleave conceives, taking the better view perhaps, that the facts might be found by the jury, but the inference should always be for the judge, since the construction of an agreement is involved.[10]

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1 Debenham *v.* Warter (London Times, 12th July, 1907).
2 Millar *v.* Radford, 19 T. L. R. 575.
3 Moses *v.* Bierling, 31 N. Y. 462.
4 Kock *v.* Emmerling, 22 How. (U. S.) 69.
5 Houghton *v* Orgar, 1 T. L. R. 653.
6 See Lord Watson in Toulmin *v.* Millar, 12 App. Cas. 746; and Lord Esher in Gillow *v.* Aberdare, 9 T. L. R. 12.
7 Brandon *v.* Hanna, [1907] 2 I. R. 212, 233.
8 Gillow *v.* Aberdare, *supra:* Millar *v.* Radford, *supra.*
9 McDonald *v.* Ortman, 88 Mich. 645; Bell *v.* Electric Co., 101 Wis. 320.
10 See Thayer, Evidence at the Common Law, 183 *et seq.*